BRIEF IN SUPPORT OF PETITION.

The Statute granting jurisdiction to the District Court is U. S. C. Title 28, Sec. 41, Par. 5, which reads in the applicable part as follows:

> "(5) Cases under internal revenue, customs, and tonnage laws.—Fifth. of all cases arising under any law providing for internal revenue."

The case at bar obviously arises under such a law, and the Circuit Court of Appeals properly so held. See also 108 F. (2d) 383, 385, 386.

The Statute laying down conditions precedent to suit is 26 U. S. C., Sec. 1672-1673 and reads as follows:

> "Secs. 1672-1673. Suits for refund—(a) Limitations—(1) Claim. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.
>
> (a) Time. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim which such suit or proceeding relates."

The Circuit Court of Appeals rested its decision solely on the second paragraph and held that the suit was not brought in time because of a credit it went outside the record and found was made in 1924.

In the first place failure to sue in time was not pleaded and hence not available to respondent. *Retzer* v. *Wood, Collector,* 109 U. S. 185 is unquestionably squarely in point. It is alone enough to dispose of this case. That case establishes that in a suit against a Collector the last paragraph of the above quoted Statute is not jurisdictional. See also the decision of the court below in the case at bar on the jurisdictional point and in *Toledo Edison Co.* v. *McMaken,* 103 F. (2d) 72, 75; also *Western Wheeled Scraper Co.* v. *United States,* 72 F. (2d) 487, 488 (C. C. A. 7th). Also rule 8(c) of the Rules of Civil Procedure states the Statute of Limitations must be pleaded. However, if the point be jurisdictional the allegation of the petition that the refund claims had never been disallowed affirmatively shows jurisdiction under the above quoted Statute. Place the petition (R. 4 to 7) beside the above quoted Statute and compliance is obvious.

In *United States* v. *Bertelsen & Petersen Engineering Co.,* 306 U. S. 276, this court said, at page 282, the credit "was a matter of defense, a justification for failure to refund and not a matter which destroyed taxpayer's cause of action or ousted the Court of jurisdiction". Yet the court below holds it destroyed the cause of action.

Paragraph 1 (a) of the last quoted Statute is the only one involved in the case at bar. The petition in the district court affirmatively showed compliance with this (R. 4 to 7). It shows the refund claims were on file more than six months before suit was begun and it alleges

these claims were never disallowed for the amount sued for (R. 6, 7).

There is nothing in this record about any credit having been made. "A matter of defense" must be pleaded and proved. Pleading, 21 Ruling Case Law, Secs. 69 and 70, pages 504 to 507.

If the Making of a Credit Is a Disallowance of a Refund Claim it Is Only Prima Facie So.

This court has expressly held a refund claim was not disallowed in a case where credit was made. *Bonwit, Teller & Co.* v. *United States*, 283 U. S. 258, 265 (note also page 11 of the government's brief in that case). See especially *Consolidated Paper Co.* v. *United States*, 59 F. (2d) 281, 289 (Ct. Cls.). If the refund claim had been disallowed there would have been nothing to credit.

However, if the making of a credit be the disallowance of a refund claim it is only *prima facie* so. It is, as this court has said, "a matter of defense." If pleaded and proved a plaintiff is entitled to an opportunity to meet it. For example, if it can show the overpayment was due to allowance of deductions which decreased its invested capital in 1920 and 1921 then the law provides no Statute of Limitations bars its claim. 44 Stat. At Large 66, construed and quoted in *United States* v. *Piedmont Mfg. Co.*, 89 F. (2d) 296, 300. Also, if the government proves a claim was disallowed and plaintiff proves it subsequently was reopened and reconsidered the disallowance is avoided. *United States* v. *Berg Warner Co.*, 108 F. (2d) 424, 426. *Watts* v. *United States* 82 F. (2d) 266 (C. C. A. 2nd). *United States* v. *Botany Mills*, 89 F. (2d) 848. In the *Bertelsen & Petersen* case a credit was made and suit was not brought within two years there-

after but this court allowed recovery. There the credit was made July 27, 1926 (98 F. (2d) 132) and suit was filed September 19, 1929 (98 F. (2d) 134). It was proved that after the credit the Commissioner reconsidered the claim. This point was also urged on the Court of Appeals in the case at bar and ignored in its opinion.

Whether a claim is disallowed and when "at most presents a question of fact". *Borg-Warner Co.* v. *United States,* 108 F. (2d) 424, 427 (C. C. A. 7th). Petitioner has had no opportunity to try this fact issue. The pleadings did not even make it. At a trial it expects to produce the Commissioner of Internal Revenue to testify that he had no intention of disallowing the claim by the credit but intended to allow and pay it. (A credit was held a payment in *United States* v. *John Gallagher,* 83 F. (2d) 368.) For extended argument showing a credit is not a disallowance of a refund claim see *amicus curiae* brief of undersigned in *Bertelsen & Petersen Mfg. Co.,* case in this court.

The statute was not passed until 1928 expressly and retroactively declaring 1924 credits void. (For this Statute see *McEachern* v. *Rose,* 302 U. S. 56, 59, 60.) The Statute cannot be given retroactive effect if suits to recover such amounts were outlawed two years before it was passed. In such circumstances the expressly retroactive clause of the Statute is judicially nullified.

All of which is respectfully submitted.

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